

1  
2  
3  
4  
5 DANIEL KEATING-TRAYNOR,

6  
7  
8 No. C 08-02907 MHP  
9 C 08-03035 MHP

10 Plaintiff(s),

11 vs.

12 AC SQUARE INC., et al.,

**ORDER RE**  
**SANCTIONS**

13 Defendant(s).  
14 \_\_\_\_\_ /

15 Plaintiff filed this action on June 11, 2008, asserting federal question jurisdiction by reason  
16 of claims under the Fair Labor Standards Act (“FLSA”), 29 U.S.C. § 201, et seq.. Another action,  
17 C-08- 02907 MHP, filed in the Superior Court of San Mateo County, was removed to this court on  
18 June 20, 2008, based upon the same FLSA claims. Indeed, the removed action was between the  
19 same parties and involved the same events, but also included state law claims. Ultimately the court  
20 dismissed all of the claims in this action as barred by the statue of limitations and remanded  
21 remaining claims in the removed action to the state court. This court’s dismissal was affirmed on  
22 appeal by the Ninth Circuit on August 19, 2009. See Case No. 08-17069, Unpublished  
23 Memorandum filed Aug. 19, 2009.

24 Defendants have moved for sanctions in the form of attorneys’ fees and costs pursuant to  
25 Federal Rule of Civil Procedure 11 and 28 U.S.C. section 1927, based upon plaintiff’s pursuit of  
26 claims that were clearly time-barred and for the multiplication of litigation. On the latter issue,  
27

1 defendants point to the four lawsuits that were filed on the very same claims, three in the Superior  
2 Court of San Mateo County and one in this court.<sup>1</sup> The first three were filed in state court: one on  
3 July 7, 2006, another on June 29, 2007, and the third on June 10, 2008. The federal action was filed  
4 on June 11, 2008. Each of these named the same plaintiff and asserted the same claims, albeit in  
5 some cases asserting the claims under a different statute. The court has reviewed the moving papers  
6 and the records in this and the companion action and the responsive papers filed by plaintiff.

7 In response to the motion attorney Berko, who filed the last three of the four complaints  
8 referred to above, argues that he withdrew his challenged pleading when the sanctions motion was  
9 presented to him and filed an amended complaint. However, that complaint still contained the time-  
10 barred claims. Berko also attempts to reargue the merits of his position which has already been  
11 ruled upon by this court and now has been affirmed by the Court of Appeals. He offers no rational  
12 explanation as to why he filed multiple complaints involving the same claims.

13 Plaintiff's counsel also contends that defendants failed to comply with the "safe harbor"  
14 requirements of Rule 11. As the evidence submitted by defendants makes clear, this is not true. The  
15 proposed motion was sent to plaintiff's counsel on July 28, 2008. Plaintiff did not withdraw the  
16 complaint or do anything to cure the deficiencies, if in fact he could; instead he filed an amended  
17 complaint that merely contained the same inadequacies. The rest of the history on this matter is  
18 borne out in the dismissal of this action and the affirmance of that dismissal.

19 Having reviewed the record in this action and in C-08-0297, the court finds that no  
20 reasonably competent and diligent attorney could have submitted and advocated the position taken  
21 in these actions with respect to the statute of limitations. A reasonably competent attorney who had  
22 done the requisite investigation and necessary research would have quickly ascertained that the  
23 claims were time-barred and he would not have continued to persist in the face of contrary evidence  
24 and well-established law.

25 The court also finds that counsel has unnecessarily, unreasonably and vexatiously multiplied  
26 the litigation by filing multiple lawsuits in two fora that have caused defendants to incur excessive  
27 costs, attorneys' fees and expenses and that these expenditures were reasonably incurred by reason  
28

1 of such conduct. Therefore, the court finds that attorneys' fees and costs shall be imposed upon  
2 plaintiff and his counsel under Rule 11 and upon his counsel under section 1927.

3 The court has reviewed the file and although defendants have submitted a declaration from  
4 one of defendants' counsel setting forth the hours expended by each counsel, no supporting  
5 documents have been filed such as contemporaneous time records breaking out the number of hours  
6 expended per case and the nature of the work performed, and ordinary billing rates have not been  
7 provided. Billing rates "for this action" do not necessarily satisfy this requirement..

8 In order to recover their fees defendants shall submit detailed declarations and time records  
9 establishing their entitlement to the amounts sought. They shall confine their requests and  
10 documentation to the hours expended on the cases in this court, namely C-08-02907 and C- 08-  
11 03035. They shall also include declarations setting forth each attorney's experience and ordinary  
12 billing or hourly rate.

13 Plaintiff will be permitted to respond as to the reasonableness of the submissions only and  
14 not to the merits of the request, which has already been adjudicated.

15 Defendants shall submit their response to this order within thirty (30) days of the date of this  
16 order and plaintiff's response, if any, shall be due within thirty (30) days thereafter, at which time  
17 the matter will be deemed submitted.

18  
19 IT IS SO ORDERED.  
20  
21

22  
23 Date: September 30, 2009  
24  
25  
26  
27  
28



MARILYN HALL PATEL  
United States District Court Judge  
Northern District of California

## ENDNOTES



# **United States District Court**

For the Northern District of California